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A SOURCE STUDY OF ISRAEL'S CONTRACT CODIFICATION

Gabriela Shalev* and Shael Herman**

I. INTRODUCTION

Today, Israel's contract law is in a remarkable transitional phase characterized by steady erosion of its English case-law substance and technique¹ and their replacement by autonomous² comprehensive legislation formally similar to certain continental codes and substantively influenced by them. During this transition, Israel may properly be called a "mixed jurisdiction,"³ although this term has a fundamentally different meaning for Israel than for other mixed jurisdictions. In temporal terms, the status of a traditional mixed jurisdiction such as Louisiana or Quebec has a certain fixity. Presupposing that Louisiana and Quebec will be mixed jurisdictions for the foreseeable future, the debate about their legal systems centers upon the extent of common law influence in their civil law tradition.⁴ By contrast, Israel is

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1. "The substance of the common law and the doctrine of equity in force in England" constitute part of the positive law of Israel by virtue of Article 46 of the Palestine Order-in-Council (1922), which the Israeli legislature adopted in § 11 of the Law and Administration Ordinance 5708-1948 upon the establishment of the State of Israel. See generally G. Tedeschi & Y.S. Zemach, *Codification and Case Law in Israel* in *THE ROLE OF JUDICIAL DECISIONS AND DOCTRINE IN CIVIL LAW AND MIXED JURISDICTIONS* 273 (J. Dainow ed. 1974) [This article is hereinafter cited as Tedeschi and Zemach. *THE ROLE OF JUDICIAL DECISIONS AND DOCTRINE* is hereinafter cited as Dainow.]

2. Various private law enactments contain autarky sections that bar the application of English law to matters covered by the enactments. See *Contracts (General Part) Law 1973*, § 63 [hereinafter cited as *General Law*], and *Contracts (Remedies for Breach of Contracts) Law 1970*, § 24 [hereinafter cited as *Remedies Law*]; both of these laws are set out in the Appendix of this article. See also *Succession Law 1965*, § 150; *Immovable Property Law 1969*, § 160.

3. Yadin, *Judicial Lawmaking in Israel*, in Dainow at 296.

4. See J.-L. Baudouin, *The Impact of the Common Law on the Civilian Systems of Louisiana and Quebec*, in Dainow at 1 (and citations therein); A. Tate, *The Role of the Judge in Mixed Jurisdictions: The Louisiana Experience*, in Dainow at 23 (and citations therein); and M.E. Barham, *A Renaissance of the Civilian Tradition in Louisiana*, in Dainow at 38 (and citations therein).

only temporarily a mixed jurisdiction. Until the enactment of the new contract legislation, contract disputes in Israel were resolved mainly according to principles of English common law and equity.⁵ As the new legislation is not retroactive,⁶ the date of a legally recognized event dictates the applicable law. Therefore, two different systems of contract law co-exist simultaneously in Israel; and English law, as part of Israel's positive contract law, will gradually pass out of use. This dualism distinguishes Israel from the traditional mixed jurisdiction in which a single system weaves certain common law threads into essentially civil law fabric. Thus, Israel's legal profession, like the Roman god Janus, must for the time being look backward and forward, drawing upon both their common law training and the newly enacted laws.

II. SOME IMPLICATIONS OF CODIFICATION

Because of its heterogeneity and multiple influences, Israel's private law has always attracted the attention of comparative scholars. Today, this private law deserves continued attention since the new legislation still reflects a variety of sources and influences. For Israel's legal scholars, comparative research (while perhaps a luxury elsewhere) has become a necessity. The new contract law cannot be fully grasped without systematic exploration of the foreign laws which influenced it. Israel's scholars must rapidly familiarize themselves with the experiences of classical civil law systems and those of other mixed jurisdictions. Yet, this relationship with other jurisdictions cannot be a one-way street. Among the legal systems subjected to comparative research, there is a natural and inevitable process of feedback and cross-fertilization.

The codification of private law, in a state where private law was formerly judge-made, may signify a new distribution of power in different quarters. For the legislature and the judiciary, the enactment of codes of private law has clear implications: the code sets out legal norms and the judge interprets and applies them. The current metamorphosis in Israel's private law also contains a message about the academicians' role and responsibility. They are now called

5. See generally Tedeschi and Zemach.

6. For the transitional provisions, see General Law § 64; Remedies Law § 25.

upon to develop "doctrine"⁷ which may constitute a subsidiary but important source of law in its own right.⁸ Doctrinal studies, founded upon the meticulous search for consistency of terms and general organizing principles, are indispensable for an overall grasp of any new codification.⁹

Doctrinal writers and courts have different vantage points and different functions. The judge's creative role begins when the parties conclude that they disagree about the meaning of the law. By contrast, scholars can hypothesize clusters of situations *a priori* to which certain provisions apply. Thus, they can provide comprehensive treatment of many matters in advance of litigation.¹⁰ Indeed, in some instances, effective doctrinal treatment of a subject can eliminate litigation and assist the judiciary in deciding cases.

As the judiciary's power over interpretation and application of the law has been criticized as undemocratic,¹¹ there is perhaps a certain virtue in designating scholars as a new

7. See, e.g., A. N. Yiannopoulos, *Jurisprudence and Doctrine as Sources of Law in Louisiana and in France*, in Dainow 69 at 82 (and citations therein).

8. Professor A. Barak, in a pioneering article, has suggested a three-stage solution to the problem of *lacunae* (gaps) in Israel's new codification in private law. At the first stage, custom would be considered; and at the second stage, analogy would be employed. If, at these stages, a gap is still unfilled, then the judge would proceed to the third stage where five alternative sources might be considered: (1) principles of Jewish law, (2) general rules such as *ubi ius ibi remedium*, (3) general principles of the legal system (e.g., ITALIAN CIVIL CODE art. 12), (4) principles of *aequitas*, and (5) the solution of the judge as legislator (as in the SWISS CIVIL CODE, art. 1). Barak, *The Codification of the Civil Law in Israel*, 3 IYUNE MISHPAT 5, 17-20 (1973) (in Hebrew) [hereinafter cited as Barak]. We suggest doctrine as an additional alternative source.

9. Doctrinal development is a traditional task for scholars in civil law systems. For example, after the Code Napoleon was promulgated, a surge of doctrinal writing took place. "When the Civil Code . . . emerged . . . in 1804, the first task it demanded on the part of the jurists consisted . . . of fixing the exact meaning of its articles and the precise scope of its provisions. . . . Each word was weighed, each article was examined alone and compared with those related to the same subject." Esmein, *Jurisprudence et Doctrine*, 1 REVUE TRIMESTRIELLE DE DROIT CIVIL 5 (1902) translated in Herman, *Excepts from a Discourse on the Code Napoleon by Portalis, and Case Law and Doctrine by A. Esmein*, 18 LOY. L. REV. 23, 28-29 (1972).

10. Such doctrinal writing is already in progress. Under the leadership and editorship of Professor G. Tedeschi, part of a Hebrew commentary on contract laws has been published already at the Institute for Legislative Research and Comparative Law, Faculty of Law, Hebrew University. Another distinguished scholar, Professor Z. Zeltner, is writing a textbook on the new contract legislation.

11. See Tedeschi and Zemach at 281.

potential source of power. The word "potential" is emphasized here because the justification for treating scholarly writing as a source of law depends upon the academicians' sensitivity to their new role.¹²

III. DIVERSITY OF INFLUENCES

During the last decade, Israel has codified its contract law on a piecemeal basis. Today it consists of eight specialized enactments¹³ and two general ones, *Contracts (General Part) Law, 1973* (hereafter *General Law*) and *Contracts (Remedies for Breach of Contracts) Law, 1970* (hereafter *Remedies Law*).¹⁴ The ten enactments have not yet been unified into a single organic code, but such a unification has been proposed¹⁵ and is anticipated.¹⁶

No single system served directly as a model for these enactments; they are not reproductions of continental codes or restatements of the ancient Jewish law.¹⁷ They were formulated as original products after comparative study of several legal systems including Jewish law.¹⁸ All of these systems yielded background materials for the Israeli lawmaker. But the extent of each system's influence is difficult to define because similar solutions to particular problems sometimes appear in more than one system. For example, the principle of presumption of acceptance embodied in the *General Law*

12. More than forty years ago, Professor Mitchell Franklin argued for a correlation between the adoption of comprehensive codes, the increased importance of academicians as doctrinal writers, and the reduction of judicial power. Franklin, *The Historic Function of the American Law Institute: Restatement as Transitional to Codification*, 47 HARV. L. REV. 1367, 1370-71 (1934). Lately, it has been suggested that the Israeli judiciary will not lose its high status, despite the movement toward codification. Barak at 24.

13. The Agency Law 1965; the Bailees Law 1967; Guarantee Law 1967; Security Interest Law 1967; Sale Law 1968; Gift Law 1968; Transfer of Obligations Law 1969; and the Hire and Loan Law 1971.

14. Translations of the General Law and the Remedies Law are in the appendix of this article.

15. Barak at 8-9.

16. Yadin, *Contracts (Remedies for Breach of Contracts) Law, 1970* in COMMENTARY ON LAWS RELATING TO CONTRACTS 11 (Tedeschi ed. 1973) (in Hebrew).

17. Yadin, *The New Statute Law of Contracts*, 9 ISRAEL L. REV. 512, 514 (1974).

18. To sensitize the Israeli lawmakers to solutions of Jewish law, the Ministry of Justice prepared and circulated a series of comparative studies of Jewish law.

(sec. 7) appears in the Italian Civil Code¹⁹ and has roots in ancient Jewish law.²⁰ The structure of Chapter 4 in the *General Law* on third party beneficiaries suggests the influence of German law²¹ and Jewish law.²² Likewise, the concept of nonpecuniary damage found in the *Remedies Law* (sec. 13) is familiar to Jewish law²³ and French law (*dommage morale*).²⁴ These examples reflect the continuing vitality of Jewish law in the new enactments. It is much harder to say that they represent a direct importation of Jewish law into the modern legislation.²⁵

Having sketched a general background of the new enactments, we propose to explore some noteworthy influences upon them.

A. Jewish Law

The demand for the total application of Jewish law as Israel's positive law has gone largely unsatisfied.²⁶ The clearest influence of Jewish law upon the two general contract enactments appears in the incorporation of terminology from Jewish law. Adoption of Jewish legal terminology seems to have presented fewer problems than inclusion of substantive Jewish law. In practice, however, the adoption of such terminology might result in misinterpretations.

1. *Resolve*

According to the introduction to the bill of the *General Law*, its first chapter, "Making of a Contract," was modeled upon the *Uniform Law on the Formation of Contracts for the International Sale of Goods* annexed to the Hague Conven-

19. ITAL. CIV. CODE arts. 1333, 1335.

20. See the explanatory notes (in Hebrew) to § 7 of the bill of the General Law.

21. BGB arts. 328-335.

22. S. WAHRHAFTIG, THE JEWISH LAW OF CONTRACT 242-61 (in Hebrew) (1974) [hereinafter cited as WAHRHAFTIG].

23. *Id.* at 340-41.

24. J. CARBONNIER, 2 DROIT CIVIL 511 (3d ed. 1962).

25. Tedeschi, *On Reception and on the Legislative Policy of Israel*, 16 SCRIPTA HIEROSOLYMITANA (STUDIES IN ISRAEL LEGISLATIVE PROBLEMS) 11, 36, n.18 (1966).

26. Cohn, *The Spirit of Israel Law*, 9 ISRAEL L. REV. 456, 459 (1974); Cohn, *Secularization of Divine Law*, 16 SCRIPTA HIEROSOLYMITANA (STUDIES IN ISRAEL LEGISLATIVE PROBLEMS) 55 (1966).

tion of 1964.²⁷ But an important term, "resolve" (*g'mirat da'at*), appears in the *General Law* (secs. 2 and 5) as an indispensable element for a valid offer and acceptance. A central question is whether the term carries the ordinary meaning it has in modern Hebrew or whether it imports the meaning implied in ancient Jewish law. In contemporary life, the term connotes an individual's inner, subjective decision. In Jewish law, it is a technical and controversial element ordinarily insufficient by itself to give a contract legal effect.²⁸

It is submitted that the term "resolve" (*g'mirat da'at*) must be interpreted according to modern usage, not Jewish law. This view is fortified by the language of the *General Law* (sec. 23) providing that a contract does not ordinarily need any special form. Moreover, section 2 of the same enactment provides that a person's proposal to another person constitutes a valid offer if it attests to the offeror's resolve to enter into a contract.

2. Third Party Beneficiary

Until the passage of the recent enactments, there was no generalized principle of third party beneficiary contracts in Israeli law. This was so, although the ancient Jewish law had developed a full and coherent solution to the problems of third party beneficiary contracts.²⁹ Yet the impetus for enactment of a chapter on this subject emerged from modern circumstances and the complexities of transactions. This

27. For the English text of this law, see 2 R. SCHLESINGER, *FORMATION OF CONTRACTS* 1695 (1968).

28. According to Jewish law, in addition to "resolve" (*g'mirat da'at*), the parties usually must participate in a formal act (*kinyan*) before their contract can have effect. Originally this formal act might consist of the exchange of valuable items. Within the scholarship on Jewish law, there is debate about the role of *kinyan* and its relationship to *g'mirat da'at*. According to Wahrhaftig, *kinyan* is an integral part of *g'mirat da'at*, and the latter is incomplete without the former. WAHRHAFTIG at 2. By contrast, Goulak regards *g'mirat da'at* and *kinyan* as respectively the subjective and objective sides of a contractual obligation. 2 GOULAK, *ELEMENTS OF JEWISH LAW* 40-41 (in Hebrew).

29. The principle that a person can acquire a right from another not in his presence is found in Jewish law. BAVA METZIA 12. For detailed explorations of the third party beneficiary principle in Jewish law, see Shaky, *The Problem of Contracts in Favor of a Third Party in English and Israeli Law and Its Solution in Jewish Law* (in Hebrew) in *SELECTED LEGAL TOPICS* 470 (1958), and WAHRHAFTIG at 242-61.

chapter is a modern structure, apparently derived from the German Civil Code,³⁰ and the direct influence of Jewish law is questionable.

B. Continental Law

1. *Good Faith in Performance and Negotiations*

The *General Law* expands the doctrinal range of contract in two ways. First, sections 12 and 39 introduce a new substantive doctrine of good faith. Second, this new doctrine also applies to the negotiation stage, which was formerly unregulated by contract theory. This doctrinal expansion reflects the legislator's intention that the new law should become a general law of obligations, thereby exceeding the traditional boundaries of contract.³¹

The application of a good faith standard to both the negotiation stage and the performance stage is a striking example of continental influence.³² This newly introduced concept can materially change the face of the contract map by blurring the contractual relations regarded by English law as the outcome of an equation whose factors are the classic expressions of will, the offer and acceptance. Unfettered will theory is a nineteenth century by-product of a *laissez-faire* mentality and self-regarding individualism; conversely, good faith, as an all-embracing principle, is a correlative of altruism, for it requires each bargaining party to take account of the other party's interests as well as his own. The apparent source of the Israeli standard of good faith is article 242 of the German Civil Code (BGB). In German law, the same principle has been applied so rigorously and broadly that today it can be regarded as a matrix in which the other contract rules interact. All these rules are restricted by the overriding power of good faith notions.³³

English law, until now the source of Israel's contract principles, does not expressly apply a standard of good faith

30. See note 21 *supra*.

31. By its own terms, the law applies also to obligations not arising from contract—General Law § 61(b).

32. Compare KESSLER & GILMORE, *CONTRACTS CASES AND MATERIALS* 912-915 (1974).

33. E.J. COHN, *MANUAL OF GERMAN LAW* 96-101 (2d ed. 1968); J. DAWSON, *ORACLES OF THE LAW* 465-79 (1968).

to the negotiation stage of contracts.³⁴ By contrast, the *General Law* (sec. 12) recognizes such a standard when the parties have not yet expressed themselves and perhaps never will express themselves by declarations of will that would fulfill the traditional offer-acceptance requirements. The adoption of section 12 blurs the sharp focus of contractual relations by pinpointing them at an earlier moment than English law does. The classical dilemma of English common law—either full contractual obligations or none at all—becomes a trilemma by the introduction of the good faith standard arising from the very fact of the negotiations themselves. Subsection 12(b) of the *General Law* gives teeth to this standard by providing an appropriate criterion for damage assessment: “negative damages” for the party injured by breach of the duty. This level of compensation would fall between full compensation for expectation, available when a contract actually exists, and no compensation at all, as was the case before the new enactment.

According to the explanatory notes of the bill of the *General Law*, section 12 introduces into Israeli law the doctrine of *culpa in contrahendo*,³⁵ the conceptual source of the requirement of good faith in negotiations. No special article of the German Civil Code embodies this doctrine as a general principle, but German courts have applied it to the negotiation stage, thereby creating a relationship of trust similar to the parties’ contractual relationship.³⁶

Many factual situations covered by section 12 can trigger other provisions of the law. For example, a contract negotiated in bad faith can result from mistake or misrepresentation; and, in an extreme case, such a contract may even be the product of extortion. In what area, then, does section 12 function?³⁷ The section can operate as an alternative

34. This standard exists, however, in a number of specific provisions employing a series of concepts similar to the principle or identical with it: the test of the reasonable person in its various applications in the interpretation of contracts and implied conditions; misrepresentation; duress; undue influence; equitable estoppel; and contracts *uberrimae fidei*. See Kessler & Fine, *Culpa in Contrahendo, Bargaining in Good Faith and Freedom of Contract: A Comparative Study*, 77 HARV. L. REV. 401 (1964).

35. The creator of the doctrine was Jhering. See Jhering, *Culpa in Contrahendo* in 4 JAHRBUCHER FÜR DIE DOGMATIK 16 (1861).

36. A. VON MEHREN, *THE CIVIL LAW SYSTEM* 491 (1957).

37. This question assumes that section 12 applies to both the negotiation stage and the formation stage. The disjunctive “or” in section 12(b) supports

or supplementary basis for relief. Because the defects in contract formation enumerated in Chapter Two of the *General Law* allow only the limited remedy of rescission,³⁸ a party may rely upon section 12 if he wants damages, not rescission. Or section 12 may supplement another section, thereby allowing an injured party to claim both damages and rescission at the same time.

The obligation of good faith in negotiations is unique; it cannot be "specifically enforced." It is useless to speak of a right of "rescission" of the negotiations in the same sense that this term applies to a fully formed contract. The proper remedy upon breach of the duty described in section 12 of the *General Law* reflects the inferiority of the pre-contractual stage to the contractual stage: the only remedy upon breach of the duty prescribed by section 12(a) is damages, and even the successful claimant is limited to the reliance interest.³⁹

2. Mistake

The *General Law* does not adopt either the English notion of consideration or the Roman notion of *causa*.⁴⁰ But the absence of *causa* or consideration in a technical sense does not mean that a party's rational perception of reality is irrelevant to the new law. For example, the *General Law* (sec. 14) allows rescission in consequence of a mistake where it may be assumed that, but for the mistake, a party would not have entered into the contract.⁴¹ This formulation is an elegant, modernized version of Toullier's description of cause or motive⁴² which appeared shortly after the promulgation of the Code Napoleon.

this view: "A party who does not act in customary manner and in good faith shall be liable . . . for the damage caused to him in consequence of the negotiations or the making of the contract" (emphasis supplied).

38. The *General Law* § 14(b) which allows the court, in its discretion, to grant damages as well as rescission is exceptional in the chapter on rescission. In light of the overriding principle of section 12 and the potential for multiple judicial interpretations of "customary manner and good faith," it seems sound drafting policy to treat the problem of innocent mistake directly in section 14 and to prescribe there the allocation of damages.

39. By contrast, Remedies Law § 10 protects the expectation interest.

40. But for the indispensability of the element of "resolve," see text accompanying note 28, *supra*.

41. Cf. LA. CIV. CODE arts. 1824, 1825. The formulation in *General Law* § 14 is also similar to the Roman notion of *error in substantia*.

42. "The reality of the determining motive is always a tacit condition of the obligation in default of which its binding effect is destroyed." 3 TOULLIER,

Another feature of the *General Law* section 14 deserves discussion here: mistake of fact and mistake of law constitute equally valid grounds for rescission. It is submitted that such treatment may be disadvantageous on policy grounds unless certain transactions are exempted from the general rule. For instance, it would be of doubtful value to allow an extrajudicial settlement or compromise, made precisely to avoid litigation, to be rescinded on the basis of mistake of law.⁴³

3. Remedies

We have already suggested that the rules in the *General Law* governing contract formation reflect continental influence. The *Remedies Law* also reflects continental influence upon remedies. Until now, Israeli courts, in conformity with the dictate of Article 46,⁴⁴ had to grant damages for breach of contract, saving specific relief for extraordinary cases where money damages did not suffice. The *Remedies Law* inverts this classic common law preference: enforcement is the preferred remedy in cases of non-performance except for the instances established in section 3. One of these exceptions relates to contracts for personal services.⁴⁵ It conforms with a long-standing common law rule and reflects the dichotomy established in the Code Napoleon between contracts to do and contracts to give.⁴⁶ Under the Code Napoleon, specific enforcement is the preferred remedy in contracts to transfer an asset (contracts to give). Conversely, the obligation to do is resolved in damages in case of non-performance.⁴⁷ This remedial distinction between contracts to

DROIT CIVIL FRANÇAIS: DES CONTRATS, no. 168 (1837). The term "motive" here refers to the accuracy of a party's perception of reality at the time he forms and expresses his will. The term does not relate to the ultimate expediency or profitability of a transaction. See General Law § 14(d).

43. A compromise is an agreement designed to end doubtful litigation. The motive or basis of this doubt is ignorance about the existence or meaning of the law. If mistake of law were a valid ground for rescission of a compromise, then a party could attack tomorrow the compromise he made today. 3 TOULLIER, DROIT CIVIL FRANÇAIS: DES CONTRATS, no. 71 (1837).

44. See generally Tedeschi and Zemach.

45. Remedies Law § 3 (2).

46. FRENCH CIV. CODE arts. 1126, 1143, and 1144. This distinction was discussed by Pothier, but its origin has been traced into Romanist doctrine. See Dawson, *Specific Performance in France and Germany*, 57 MICH. L. REV. 495 (1959) [hereinafter cited as Dawson].

47. FRENCH CIV. CODE art. 1143.

give and to do is absent in German law, which permits an aggrieved party to get a judgment for specific enforcement of a promise to do an act, even if the act depends exclusively upon his will. And if the party in breach refuses to carry out the judicial order, he is subject to body arrest and unlimited fines.⁴⁸

While enforcement as a preferred form of relief is theoretically consistent with the principle of *pacta sunt servanda*, it bars mitigation of damages and therefore may sometimes be economically unsound. The concept of mitigation of damages is geared to a remedial system in which the primary remedy is damages, not enforcement. Since the *Remedies Law* envisions enforcement as the remedy in most cases, section 14 of this law concerning mitigation of damages loses much of its force.⁴⁹ For instance, a seller of goods, upon learning of the buyer's breach, must hold the goods pending the outcome of his suit against the buyer for the price. Retention of the goods would preclude mitigation of damages on the open market. In cases involving perishable items, the economic waste would be especially pronounced.⁵⁰

C. English Law

1. Damages

While the choice of enforcement as the preferred remedy reflects continental influence, the influence of the English common law is still particularly clear in the damage formulation provided by the *Remedies Law*. The classical test for damages at common law, as prescribed in *Hadley v. Baxendale*,⁵¹ rests upon the notion that recovery of damages for breach ought to be limited by the foreseeability of the damage. The *Remedies Law* (sec. 10) adopts the foregoing rationale and incorporates the foreseeability test⁵² of *Hadley*

48. GERMAN CODE CIV. P. [ZPO] arts. 889, 890, 892. See also Dawson at 527-28.

49. In light of the Remedies Law § 11, the role of mitigation of damages is unclear. See text at note 57, *infra*.

50. Contrast UNIFORM COMMERCIAL CODE secs. 2-706, 2-710, 2-712. In conformity with common law tradition, the Uniform Commercial Code reflects a preference for damages as a primary remedy.

51. 156 E.R. 145, 9 Exch. 341 (1854).

52. Originally, *Hadley v. Baxendale* provided two alternative tests; the "foreseeability test" was the second.

v. Baxendale, which in later English cases⁵³ was modified by reference to the foreseeability of the party in breach, not of both parties. It is obvious that the phrasing of section 10⁵⁴ is derived from the common law tradition.

2. *Anticipatory Repudiation*

Section 17 of the *Remedies Law* reflects influence of the English doctrine of anticipatory breach.⁵⁵ The section acknowledges the subsistence of a juridical tie between the parties from the formation until the performance of a contract; and it respects the parties' intentions by prohibiting a court from ordering the execution of a contractual obligation before the time agreed upon.

Since the emergence of the doctrine of anticipatory breach, it has raised both theoretical and practical questions. The central theoretical question is how one can speak of a breach when the time fixed for performance has not yet arrived. "The phrase [anticipatory breach] is not happy, for there can be no actual breach of a contract by reason of non-performance so long as the time for performance has not yet arrived"⁵⁶ This theoretical difficulty can be overcome by arguing that the anticipatory breach pertains to an existing obligation, not a future one. The present duty arises from a party's implied promise to be loyal to the contract until its completion. This view is consistent with the pervasive notions of good faith embodied in *General Law* sections 12 and 39.

Assuming that the foregoing argument solves the theoretical problem of anticipatory breach, practical problems remain. A practical advantage of the doctrine of anticipatory repudiation is to allow the aggrieved party the maximum time to mitigate his damages, thereby preventing economic waste. But this goal must not have concerned the lawmakers, for the *Remedies Law* section 14(a), by omitting reference to section 11, exempts from the requirement of mitigation, contracts to receive or to supply any property, service,

53. See *Victoria Laundry (Windsor) Ltd. v. Newman Industries, Ltd.*, 2 K.B. 528 (1949).

54. "At the time the contract was made" and "as a probable result of the breach."

55. See *Frost v. Knight*, L.R. 7 Ex. 111 (1872). For a discussion of the remedies upon anticipatory breach, see Shalev, *Remedies on Anticipatory Repudiation*, 8 ISRAEL L. REV. 123 (1973).

56. G. CHESHIRE & C. FIFOOT, *LAW OF CONTRACT* 530 (7th ed. 1969).

or money. This broad category includes numerous commercial transactions such as sale, lease, and loan. The lawmaker, by exempting so many commercial transactions from the mitigation-of-damage requirement, calls into question the fundamental purpose for adopting the English doctrine of anticipatory breach.⁵⁷

D. Israeli Law

1. *Extortion*

Chapter Two of the *General Law* is based upon a draft of a law (concerning the validity of contracts) prepared at the Institute for Unification of Private Law in Rome (Unidroit).⁵⁸ But the provisions in Chapter Two concerning extortion and compulsion as bases for rescission do not originate in this draft. They are by-products of legal control over offenses, and seek to achieve harmony between the civil and criminal branches of the law. Under certain conditions, the elements of these provisions constitute criminal acts according to Israel's *Law Amending the Criminal Law (Offenses of Fraud, Blackmail and Extortion) 1963*. Interestingly, section 18 (extortion) closely resembles German Civil Code article 138 which itself was derived from German criminal law.⁵⁹

2. *Public Policy*

"Public policy" is a dynamic concept that varies from place to place and epoch to epoch. Its content changes as lawmakers and judges take account of the values and principles of their legal order and express them in law. Certain escape valve concepts in Israeli legislation such as "good faith," "customary usage," and "public policy" can be interpreted only in light of Israel's socio-economic circumstances. According to the *General Law* (sec. 30), contracts contrary to

57. See also text accompanying note 49, *supra*. Query, if the phrase "supply or receive any property or service" in Remedies Law § 11 is read broadly as meaning "contracts to do and to give," then what kinds of contracts are subject to the mitigation requirement? Three possible answers can be suggested: (a) where the injured party cannot rescind or does not want to rescind the contract; (b) where the injured party chooses to sue under section 10 of the Remedies Law; and (c) where the damages on the date of rescission cannot be estimated in monetary terms.

58. See Introduction to the bill of the General Law (in Hebrew).

59. Dawson, *Economic Duress and the Fair Exchange in French and German Law*, 12 TUL. L. REV. 42 at 49 (1937).

public policy are void. Even in the past, when the historical source of the term "public policy" was the Ottoman legislation,⁶⁰ the Supreme Court ruled that the term must be interpreted in accordance with the realities of the Israeli state.⁶¹ *A fortiori*, as the principle is now established by independent legislation, the same rule should prevail.

IV. CONCLUSION

Earlier, we suggested that Israel's legal profession, like the Roman god Janus, had to retain their common law training while learning the newly codified law. The cardinal principle in learning this new law should be the careful examination of each section of the enactments with attention to the logical consistency of the sections and their interrelationships. To facilitate this learning process, the academicians must develop doctrinal studies which uncover influences, seek internal coherence of the new system, and suggest pitfalls of the law where the coherence is incomplete.

60. Ottoman Code of Civil Procedure, art. 64.

61. The possible legal sources for interpreting "public policy" were Israeli law, English law, and French law, which was the historical source of section 64 of the Ottoman law. The prevailing opinion was that this section, while it might create a general framework and formally might be defined by reference to French jurisprudence, should have Israeli content. *Zim v. Maziar*, 17 Piskei Din 1319, at 1332, 1334 (1962).

APPENDIX

CONTRACTS (GENERAL PART) LAW, 5733-1973

CHAPTER ONE: *Making of Contract*

1. A contract is made by way of offer and acceptance in accordance with the provisions of this chapter.
2. A person's proposal to another person constitutes an offer if it attests to the offeror's resolve to enter into a contract with the offeree and is sufficiently definite to enable the contract to be concluded by acceptance of the offer. A proposal may be to the public.
3. (a) The offeror may withdraw the offer by notice to the offeree, provided that the notice of withdrawal is delivered to the offeree before he has given notice of acceptance.
(b) Where the offeror has declared that the offer is irrevocable or has set a time for its acceptance, he may not withdraw it after it has been delivered to the offeree.
4. An offer lapses—
 - (1) when the offeree has rejected it or the time for its acceptance has elapsed;
 - (2) when before notice of acceptance is given the offeror or offeree dies or becomes legally incompetent or a receiving order or winding-up order is made against him.
5. Acceptance shall be by notice by the offeree delivered to the offeror and attesting to the offeree's resolve to enter into the contract with the offeror in accordance with the offer.
6. (a) Acceptance may be by an act in implementation of the contract or by some other conduct if these modes of acceptance are implied in the offer; and for the purposes of sections 3(a) and 4(2), conduct as aforesaid is treated as notification of acceptance.
(b) A declaration by an offeror that the absence of any response on the part of the offeree shall be regarded as acceptance is of no effect.
7. An offer which is exclusively for the benefit of the offeree is presumed to have been accepted by him unless he notifies the offeror of his opposition to it within a reasonable time after it comes to his knowledge.
8. (a) An offer can only be accepted within the period fixed therein or, if no period has been fixed, within a reasonable time.
(b) Where an offeree gives notice of acceptance in due time, but its delivery to the offeror is delayed for a reason not dependent upon the offeree and unknown to him, the contract is regarded as having been made unless the offeror notifies the offeree of the rejection of the acceptance immediately after the notice of acceptance is delivered to him.
9. Acceptance of an offer after it has lapsed is tantamount to a new offer.
10. The offeree may withdraw his acceptance by notice to the offeror, provided that notice of the withdrawal is not delivered to the offeror after the notice of acceptance has been delivered to him or after he has become aware of the acceptance in the manner indicated in section 6(a).
11. Acceptance involving an addition to or a limitation or some other variation of the offer is tantamount to a new offer.

12. (a) In negotiating a contract, a person shall act in customary manner and in good faith.
- (b) A party who does not act in customary manner and in good faith shall be liable to pay compensation to the other party for the damage caused to him in consequence of the negotiations or the making of the contract, and the provisions of sections 10, 13 and 14 of the Contracts (Remedies for Breach of Contract) Law, 5731-1970, shall apply *mutatis mutandis*.

CHAPTER TWO: *Rescission of Contract by Reason of Defect in Making It*

13. A contract made merely for appearance sake is void. This provision shall not affect a right acquired by a third party in *bona fide* reliance on the existence of a contract.
14. (a) Where a person has entered into a contract in consequence of a mistake and it may be assumed that but for the mistake he would not have entered into it, and the other party knows or should have known this, he may rescind the contract.
- (b) Where a person has entered into a contract in consequence of a mistake and it may be assumed that but for the mistake he would not have entered into it, but the other party did not know and need not have known this, the Court may, on the application of the party who was mistaken, rescind the contract if it considers it just so to do. Upon doing so, the Court may require the party who was mistaken to pay compensation for the damage caused to the other party in consequence of the making of the contract.
- (c) A mistake is not a ground for rescission of the contract under this section if the contract can be preserved by rectifying the mistake and the other party, before the contract has been rescinded, gives notice that he is prepared to rectify it.
- (d) For the purposes of this section and of section 15, "mistake" means a mistake of fact or of law, but does not include a mistake as to the expediency of the transaction.
15. A person who has entered into a contract in consequence of a mistake resulting from deceit practised upon him by the other party or a person acting on his behalf may rescind the contract. For this purpose, "deceit" includes the non-disclosure of facts which according to law, custom or the circumstances the other party should have disclosed.
16. Where a clerical or similar error has occurred in a contract, the contract shall be rectified in accordance with the presumed intention of the parties and the error shall not be a ground for rescission of the contract.
17. (a) A person who has entered into a contract in consequence of duress, by force or threats applied to him by the other party or a person acting on his behalf may rescind the contract.
- (b) A *bona fide* warning of the exercise of a right does not constitute a threat for the purposes of this section.
18. Where a person has entered into a contract in consequence of the other party or a person acting on his behalf, taking advantage of his distress, mental or physical weakness or inexperience, and the terms of the contract are less favourable to an unreasonable degree than is customary, he may rescind the contract.
19. Where the contract is severable and the ground for rescission relates

only to one part thereof, such part alone shall be capable of rescission. But if it is to be assumed that the party entitled to rescind would not have entered into the contract but for that ground, he may either rescind the said part or the whole contract.

20. Rescission of a contract shall be by notice by one party to the other party given within a reasonable time after becoming aware of the ground for rescission or, in the case of duress, within a reasonable time after becoming aware that duress has ceased.
21. Where a contract has been rescinded, each party shall restore to the other party what he has received under the contract or, if restitution is impossible or unreasonable, pay him the value of what he has received.
22. The provisions of this chapter shall not derogate from any other remedy.

CHAPTER THREE: *Form and Contents of Contract*

23. A contract may be made orally, in writing or in some other form unless a particular form is a condition of its validity by virtue of law or agreement between the parties.
24. The contents of a contract may be whatever is agreed upon by the parties.
25. (a) A contract shall be interpreted in accordance with the intention of the parties as appearing therefrom or, in so far as it does not so appear, as appearing from the circumstances.
(b) Where a contract is capable of different interpretations, an interpretation preserving it is preferable to an interpretation according to which it is void.
(c) Expressions and stipulations in a contract which are customarily used in contracts of that kind shall be interpreted in accordance with the meanings assigned to them in such contracts.
(d) Sections 2, 3, 5, 9(a) and 36 of the Interpretation Ordinance shall apply *mutatis mutandis* to the interpretation of a contract.
26. Particulars not determined by or under the contract shall be in accordance with the practice obtaining between the parties, or in the absence of such a practice, in accordance with the practice customary in contracts of that kind, and such particulars shall also be regarded as having been agreed.
27. (a) A contract may depend on the fulfilment of a condition (hereinafter referred to as a "suspensory condition") or may cease upon the fulfilment of a condition (hereinafter referred to as a "resolutive condition").
(b) Where a contract requires the consent of a third party or a licence under any enactment, the receipt of such consent or licence is presumed to be a suspensory condition.
(c) Where a contract is subject to a suspensory condition, each party is entitled to relief to prevent its breach even before the condition is fulfilled.
28. (a) Where a contract is subject to a suspensory condition and one party prevents fulfilment of the condition, such party is not entitled to rely on the nonfulfilment.
(b) Where a contract is subject to a resolutive condition and one party causes fulfilment of the condition, such party is not entitled to rely on the fulfilment.

- (c) The provisions of this section shall not apply where the condition is something that according to the contract a party is at liberty to do or not to do or where a party does not prevent or cause the fulfilment of the condition wilfully or negligently.
29. Where a contract is subject to a condition and the condition is not fulfilled within the period fixed therefor or, where no period has been fixed, within a reasonable time after the making of the contract, then, in the case of a suspensory condition, the contract or in the case of a resolatory condition, the condition shall become void.
30. A contract the making, contents or object of which is or are illegal, immoral or contrary to public policy is void.
31. The provisions of sections 19 to 21 shall apply *mutatis mutandis* to the avoidance of a contract under this chapter: Provided that in the case of avoidance under section 30 the Court may, if it deems it just so to do and on such conditions as it sees fit, relieve a party of the whole or part of the duty under section 21 and, in so far as one party has fulfilled his obligation under the contract, require the other party to fulfil the whole or part of the corresponding obligation.
32. (a) A gambling, lottery or betting contract under which a party may win some benefit, the winning being dependent on fate, guesswork or a chance occurrence rather than on understanding or ability, is not actionable and does not give rise to compensation.
- (b) The provisions of this section shall not apply to gambling, a lottery or betting regulated by Law or for the conduct of which a permit has been issued under any Law.
33. Where under any contract a mark, title, prize or the like is to be given according to a decision or evaluation by one of the parties or a third party, such decision or evaluation shall not be the subject of Court proceedings.

CHAPTER FOUR: *Contract in Favour of Third Party*

34. An obligation assumed by a person by contract in favour of a person who is not a party to the contract (such person hereinafter referred to as "the beneficiary") confers on the beneficiary the right to demand fulfilment of the obligation if the intention to confer this right on him is apparent from the contract.
35. The beneficiary's right to demand fulfilment of the obligation becomes void retroactively if within a reasonable time after one of the parties to the contract informs him of the right he informs one of them of his repudiation thereof.
36. (a) So long as neither of the parties has informed the beneficiary of his right under the contract they may vary or terminate such right by varying the contract.
- (b) In the case of an obligation to be fulfilled in consequence of a person's death—by virtue of an insurance contract or membership in a pension or provident fund or on some other similar ground—the creditor may, by notice to the debtor or by will of which notice is given to the debtor, terminate the beneficiary's right or replace him with another beneficiary, even after he has been informed of his right.
37. Any plea available to the debtor against the creditor in connection with the obligation is also available to him against the beneficiary.

38. The beneficiary's right shall not derogate from the creditor's right to demand from the debtor the fulfilment of the obligation in favour of the beneficiary.

CHAPTER FIVE: *Performance of Contract*

39. An obligation or right arising out of a contract shall be fulfilled or exercised in customary manner and in good faith.
40. An obligation may be fulfilled by a person other than the debtor unless according to the nature of the obligation or to the agreement between the parties the debtor must fulfil it personally.
41. An obligation the date for the fulfilment of which has not been agreed upon shall be fulfilled within a reasonable time after the making of the contract, at a date of which the creditor has given the debtor reasonable notice in advance.
42. An obligation may be fulfilled before the due date, provided the debtor has given the creditor reasonable notice in advance and the creditor is not adversely affected.
43. (a) The date for the fulfilment of the obligation is postponed—
- (1) if its fulfilment at the due date is prevented by a circumstance depending on the creditor—until the obstacle has been removed;
 - (2) if its fulfilment is conditional upon the prior fulfilment of an obligation of the creditor—until such obligation has been fulfilled;
 - (3) if the parties must fulfil their obligations *pari passu*—so long as the creditor is not prepared to fulfil the obligation imposed on him.
- (b) Where the date for the fulfilment of an obligation has been postponed under subsection (a), the Court may, if it deems it just so to do, require the creditor to pay compensation for the damage caused to the debtor by the postponement even if no infringement of the contract by the creditor is involved and, if the debtor is bound to make periodical payments until the fulfilment of the obligation, release him from the payments during the period of postponement.
44. (a) An obligation the place for the fulfilment of which has not been agreed upon shall be fulfilled at the creditor's place of business or, if he has no place of business, at his permanent place of residence.
- (b) Where the creditor changes his place of business or place of residence after the making of the contract, he shall bear the additional expenses arising out of the fulfilment of the obligation at the new place.
45. An obligation to provide a commodity or service the kind and quality of which have not been agreed upon shall be fulfilled by providing a commodity or service of medium kind and quality.
46. An obligation to make for a commodity or service a payment the amount of which has not been agreed upon shall be fulfilled by paying an amount which according to the circumstances at the time the contract was made it would have been appropriate to pay.
47. An obligation to make in foreign currency in Israel a payment the making of which in that currency is forbidden by law shall be fulfilled by making it in Israel currency at the official rate of exchange obtaining on the day of payment.
48. Where for the purpose of fulfilling an obligation the debtor assumes another obligation towards the creditor or transfers to him a right in respect of a third party, it is presumed that it is not intended to termi-

- nate such first-mentioned obligation unless the other obligation has been fulfilled or the right realised.
49. An amount paid towards the discharge of a single obligation shall first be appropriated to the account of expenses which the debtor has undertaken to pay in respect of that obligation, then to the account of interest and finally to the account of the obligation itself.
50. Where an amount is paid to the creditor while the debtor has several obligations towards him, the debtor may indicate at the time of payment the obligation to the account of which the amount is to be appropriated; if he does not, the creditor may do so.
51. (a) In the case of alternative obligations, the debtor may, by notice to the creditor within the period fixed therefor or, where no period has been fixed, within a reasonable time prior to the date of fulfilment, choose the obligation which he will fulfil. If he does not do so, the creditor may choose the obligation by notice to the debtor.
- (b) Where it has been agreed that the creditor shall have the right of choice and he does not exercise it within the period fixed therefor or, where no period has been fixed, within a reasonable period prior to the date of fulfilment, the debtor may choose the obligation by notice to the creditor.
52. Where the fulfilment of an obligation has become impossible, and the debtor has accordingly a right to compensation or indemnification against a third party, the debtor shall transfer the right or what he has received thereunder to the creditor to the extent of the value of the obligation.
53. (a) Mutual monetary obligations arising out of one transaction the time for the fulfilment of which has arrived may be set off by notice by one party to the other. The same applies to monetary obligations not arising out of one transaction if they are liquidated obligations.
- (b) An obligation the right to the fulfilment of which is not attachable shall not be set off.
- (c) The provisions of sections 49 and 50 shall also apply, *mutatis mutandis*, to discharge by way of set-off.

CHAPTER SIX: *Several Debtors and Creditors*

54. Where two persons are under one obligation, it is presumed that they are liable jointly and severally.
55. (a) Where two persons are jointly and severally liable, the creditor may demand fulfilment of the whole or part of the obligation from both of them together or from each of them separately, but he shall not recover more than is due to him.
- (b) If the obligation of one of the debtors becomes void or is voided, the obligation of the other also becomes void unless the voidance arises out of a defect in the competence or representation of the first-mentioned debtor.
- (c) If the creditor discharges one of the debtors of the whole or part of the obligation—by way of waiver, remission, compromise or otherwise—the other is discharged to the same extent unless a different intention appears from the discharge.
56. (a) Where two persons are under one obligation, it is presumed that as between themselves they bear it in equal shares.
- (b) Where one debtor has paid to the creditor more than his share of the

- burden of the obligation, he is entitled to recover from the other debtor in accordance with their respective shares.
- (c) Where there are more than two debtors and there is no reasonable possibility of recovering from one of them, his share shall be borne by the other debtor in accordance with respective shares.
- (d) Where the obligation of one debtor becomes void under section 55 (b), the voidance arising from a defect in his competence or representation, the other is not entitled to recover from him. Where one debtor is discharged under section 55 (c) and the discharge does not include the other, the discharge does not affect the right of recovery against the other under this section.
57. A debtor who has fulfilled the obligation in excess of his share is not entitled to recover from another debtor in so far as he could have been discharged vis-a-vis the creditor by virtue of a plea which was known to him but of which he did not avail himself.
58. (a) Any charge or other right given to a creditor as security for the obligation shall, in so far as the creditor is not adversely affected thereby pass to a debtor who has fulfilled the obligation in excess of his share as security for his right to recover from another debtor.
- (b) Where a charge or right has passed under subsection (a), the parties shall, on the demand of the debtor who has fulfilled the obligation, do the acts necessary in order that the transfer may be valid in all respects.
59. (a) Where one obligation exists vis-a-vis two persons, it is presumed that each of them may demand its fulfilment, but they shall not recover from the debtor more than is due from him. The debtor may at his choice fulfil the obligation towards one of the creditors so long as judgment has not been given in favour of the other.
- (b) Creditors as aforesaid are presumed to be entitled in equal shares. If the obligation has been fulfilled towards one of them, the other may demand his share from him.

CHAPTER SEVEN: *Miscellaneous*

60. (a) Notice under this Law shall be given in the manner customary in the circumstances of the case.
- (b) Notice under this Law shall be taken to have been served when it reached the addressee or his address.
61. (a) The provisions of this Law shall apply where no other Law contains special provisions regarding the matter in question.
- (b) The provisions of this Law shall as far as appropriate and *mutatis mutandis*, apply also to legal acts other than contracts and to obligations not arising from a contract.
62. There are hereby repealed—
- (1) articles 658, 948, 949 and 1003 to 1007 and the Twelfth Book of the Mejele;
- (2) article 64 of the Ottoman Code of Civil Procedure of the 2nd Rejeb, 1296 (21st June, 1879).
63. Article 46 of the Palestine Order-in-Council, 1922-1947, shall not apply to matters dealt with by this Law.
64. This Law shall come into force on the 1st Elul, 5733 (29th August, 1973). Contracts made before the coming into force of this Law shall continue to be governed by the previous law.

CONTRACTS (REMEDIES FOR BREACH OF CONTRACTS) LAW,
5731-1970

CHAPTER ONE: *General Provisions*

1. (a) In this Law—

“breach” means an act or omission in contravention of a contract;

“injured party” means a person entitled to performance of a contract which has been broken;

“enforcement” means enforcement by an order for the discharge of a monetary obligation or some other mandatory order or by a restraining order, and includes enforcement by an order for the repair or removal of the consequences of the breach;

“damage” includes prevention of profit.

(b) Every reference in this Law to the breach of a contract shall be taken to include a breach of any of its obligations.

2. Where a contract has been broken, the injured party is entitled to claim its enforcement or to rescind the contract, and in addition to or in lieu of one of the said remedies he is entitled to compensation, all as provided in this Law.

CHAPTER TWO: *Remedies*

ARTICLE ONE: *Enforcement of Contract*

3. The injured party is entitled to enforcement of the contract unless one of the following obtains:

- (1) the contract is impossible of performance;
- (2) enforcement of the contract consists in compelling the doing or acceptance of personal work or a personal service;
- (3) implementation of the enforcement order requires an unreasonable amount of supervision on behalf of a court or an execution office;
- (4) enforcement of the contract in the circumstances of the case is unjust.

4. The Court may make enforcement of the contract conditional upon fulfilment of the obligations of the injured party or upon assurance of their fulfilment or upon other conditions necessarily resulting from the contract in the circumstances of the case.

5. Where an enforcement order is made in respect of an obligation to transfer the ownership of or a right in property and the transfer requires registration in a register kept under any enactment, the registration shall be made by virtue of the enforcement order and in accordance with its provisions as if it were made on the application of the parties.

ARTICLE TWO: *Rescission of Contract*

6. For the purposes of this article, “fundamental breach” means a breach as to which it may be assumed that a reasonable person would not have entered into the contract had he foreseen the breach and its consequences, or a breach as to which it has been agreed in the contract that it shall be regarded as fundamental; a sweeping stipulation in a contract making breaches fundamental without differentiating between them is invalid unless it was reasonable at the time the contract was made.

7. (a) The injured party is entitled to rescind the contract if the breach thereof is fundamental.

(b) Where the breach of the contract is not fundamental, the injured party may rescind the contract if he has first given the person in breach an extension of time for its performance and the contract has not been performed within a reasonable time after giving of extension, unless in the circumstances of the case rescission of the contract is unjust; the plea that rescission of the contract is unjust shall not be heard unless the person in breach opposes the rescission within a reasonable time after notice of rescission is given.

(c) Where the contract is severable into parts and one of the parts has been broken in a manner giving cause for rescission of that part, the injured party is only entitled to rescind the part which has been broken; if the breach constitutes also a fundamental breach of the whole contract, the injured party is entitled to rescind the part which has been broken or the whole contract.

8. Rescission of the contract shall be by notice by the injured party, within a reasonable time after he learnt of the breach, to the person in breach; however, in the case referred to in section 7(b) and in every other case in which the injured party has given an extension of time for performance of the contract, notice of rescission shall be given within a reasonable time after the extension of time has expired.

9. (a) Where the contract has been rescinded, the person in breach shall restore to the injured party what he has received thereunder or, if restitution is impossible or unreasonable or the injured party so chooses, shall pay him the value thereof; and the injured party shall restore to the person in breach what he has received under the contract, or, if restitution is impossible or unreasonable or the injured party so chooses, shall pay him the value thereof.

(b) Where part of the contract has been rescinded, the provisions of subsection (a) shall apply to what the parties have received under that part.

ARTICLE THREE: *Compensation*

10. The injured party is entitled to compensation for the damage caused to him by the breach and its consequences and which the person in breach foresaw or should have foreseen, at the time the contract was made, as a probable consequence of the breach.

11. (a) Where an obligation to supply or receive any property or service has been broken and the contract is rescinded by reason of the breach, the injured party shall, without proof of damage, be entitled to compensation in the amount of the difference between the consideration for the property or service under the contract and its value on the date of rescission of the contract.

(b) Where an obligation to pay a sum of money has been broken, the injured party shall, without proof of damage, be entitled to compensation in the amount of the interest on the sum in arrears from the date of the breach to the date of payment, at the full rate under the Adjudication of Interest Law, 5721-1961, unless the Court has prescribed a different rate.

12. The provisions of section 11 shall not derogate from the right of the

injured party to compensation for damage proved under section 10; however, if the consideration in respect of the obligation that has been broken was unreasonable, or if there was no consideration at all, the Court may reduce the compensation to the amount indicated in section 11.

13. Where the breach of contract has caused other than pecuniary damage, the Court may award compensation for that damage at the rate it deems appropriate in the circumstances of the case.

14. (a) The person in breach shall not be liable to pay compensation under sections 10, 12 and 13 for damage which the injured party could have prevented or reduced by reasonable measures.

(b) Where the injured party has incurred reasonable expenses or contracted reasonable liabilities for the prevention or reduction of damage, the person in breach shall indemnify him therefor, whether or not the damage was in fact prevented or reduced; if the expenses or liabilities were unreasonable, the person in breach shall be liable to indemnify the injured party to the extent reasonable in the circumstances of the case.

15. (a) Where the parties have agreed in advance on the rate of compensation (such compensation hereinafter referred to as "agreed compensation"), compensation shall be as agreed, without proof of damage; however, the Court may reduce the compensation if it finds that it was fixed without any reasonable relation to the damage which could be foreseen, at the time the contract was made, as a probable consequence of the breach.

(b) An agreement as to agreed compensation shall not by itself derogate from the right of the injured party to claim compensation under sections 10 to 14 in lieu thereof or from any other remedy for breach of contract.

(c) For the purposes of this article, sums which the person in breach paid to the injured party before the breach and which the parties agreed in advance should be forfeited to the injured party are deemed to be agreed compensation.

16. In fixing the amount of compensation, no sum which by reason of the breach of contract the injured party has received or is entitled to receive under a contract of insurance shall be taken into account.

CHAPTER THREE: *Miscellaneous*

17. Where a party to the contract indicates his intention not to perform it or where it appears from the circumstances that he will be unable or unwilling to perform it, the other party is entitled to the remedies under this Law even before the time fixed for performance of the contract; but the Court shall not in making an enforcement order, direct that an obligation shall be carried out before the time fixed for its performance.

18. (a) Where the breach of contract is the result of circumstances which at the time of making the contract the person in breach did not know of or foresee and need not have known of or foreseen, and which he could not have avoided, and performance of the contract under these circumstances is impossible or fundamentally different from what was agreed between the parties, the breach shall not give cause for enforcement of the contract or for compensation.

(b) In the cases referred to in subsection (a), the Court may, whether or not the contract has been rescinded, require each party to restore to the other party what he has received under the contract or, at his choice as provided in section 9, to pay him the value thereof, and require the person in breach to indemnify the injured party for expenses reasonably incurred and liabilities reasonably contracted by him for the performance of the contract, all if and insofar as the Court deems it just to do so in the circumstances of the case.

19. Where in consequence of the contract the injured party has received any property of the person in breach which he must return, the injured party shall have a lien on such property to the extent of the sums due to him from the person in breach, in consequence of the breach.

20. Mutual debts of the parties under this Law may be set off.

21. (a) Notice under this Law shall be given in the manner determined by the parties, and in the absence of such a determination, by registered post or in some other manner customary in the circumstances of the case.

(b) An injured party who has given notice as provided in subsection (a) and who has reason to believe that the notice reached its destination in time may rely on it even if its arrival was delayed or it has not arrived at all.

22. (a) This Law shall not derogate from the power of the Court to grant a declaratory judgment, a mandatory or restraining order (whether provisional or permanent), an interim decision or any other relief.

(b) The provisions of this Law shall apply where no Law regulating labour relations or any other Law contains special provisions for the matter in question.

23. Articles 106 to 111 of the Ottoman Code of Civil Procedure of the 2nd Rejeb, 1296 (21st June, 1879) are hereby repealed.

24. In matters dealt with by this Law, article 46 of the Palestine Order-in-Council, 1922-1947, shall not apply.

25. This Law shall come into force on the 1st Nisan, 5731 (27th March, 1971); contracts made before the coming into force of this Law shall continue to be governed by the previous law.

